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8
9 UNITED STATES DISTRICT COURT
10 NORTHERN DISTRICT OF CALIFORNIA
11 SAN FRANCISCO DIVISION

12 TRUE HEALTH CHIROPRACTIC, INC., et al.,

13 Plaintiffs,

14 v.

15 MCKESSON CORPORATION, et al.,

16 Defendants.
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Case No. 13-cv-02219-HSG

**DEFENDANTS' OPPOSITION TO
PLAINTIFFS' MOTION FOR
CLASS CERTIFICATION**

Honorable Haywood S. Gilliam, Jr.

Hearing Date: September 10, 2015

Time: 2:00 p.m.

Courtroom: Courtroom 15, 18th Floor

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-----------------------------------	----

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1 I. INTRODUCTION

2 Two chiropractic businesses filed this lawsuit and seek over \$100 million for receiving
3 four faxed pieces of paper that allegedly failed to include instructions on how to opt out of
4 receiving those faxes. In the operative complaint, Plaintiffs sought to certify a class of businesses
5 that received *unsolicited* faxes. Acknowledging that their original proposed class could not be
6 certified, Plaintiffs assert for the first time in their class motion a new class definition that
7 includes “recipients” of unsolicited and *solicited* faxes — faxes that “recipients” invited or gave
8 permission to receive. Plaintiffs’ new strategy and class definition also fail.

9 Plaintiffs’ new class includes recipients of solicited faxes and thus includes members with
10 no claims. This overbroad class is also unidentifiable and unascertainable. The fax transmission
11 records do not show who owned the fax machine (owner), who subscribed to the fax number
12 (subscriber), or who actually picked up the fax (recipient). Plaintiffs attempt to avoid the
13 ascertainability requirement by arguing that the class member can be the owner, subscriber, *or*
14 recipient, but a TCPA claim for a single fax transmission cannot belong to multiple parties.
15 Individualized inquiries into the circumstances surrounding each fax transmission would be
16 required to identify the class members.

17 Further, individual, not common, issues overwhelmingly predominate. Those individual
18 issues include not only the question of who received the fax, but also who consented to receiving
19 the fax. The provisions of the TCPA on which Plaintiffs base their claims — including the
20 requirement that faxes include an “opt-out” notice — uniformly and unambiguously apply only to
21 *unsolicited* faxes. 47 U.S.C. §§ 227(b)(1)(C)(i), (iii), (b)(2)(D). That the fax sent was unsolicited
22 (i.e., sent without consent) is a required element of the Plaintiffs’ affirmative case. Given that
23 Defendants sent faxes only to current customers and obtained consent in multiple ways, including
24 oral communications with customers, individual questions regarding each class member’s consent
25 to receive the faxes overwhelm any common issues and defeat predominance.

26 Neither of the named Plaintiffs is an adequate or typical class representative. Plaintiff
27 True Health’s sole owner has admitted to fraud in a consent decree, and True Health is the target
28 of a continuing FBI fraud investigation. Fraud-related offenses detract from the claims of the

1 class and raise doubts about the named plaintiff's credibility and integrity, rendering True Health
 2 inadequate and atypical. The record also demonstrates that both Plaintiffs consented to receive
 3 the faxes at issue. The named Plaintiffs are not adequate class representatives.

4 Plaintiffs' final effort to avoid the fatal problems with their (b)(3) class by asserting a
 5 (b)(2) class for injunctive relief also fails. Courts in this Circuit have repeatedly rejected attempts
 6 by TCPA plaintiffs to certify a (b)(2) class because plaintiffs are primarily seeking monetary
 7 damages. No class can be certified here.

8 **II. PROCEDURAL HISTORY**

9 On May 15, 2013, True Health Chiropractic, Inc. ("True Health") filed this putative class
 10 action alleging McKesson Corporation sent "unsolicited advertisements" by facsimile (or "fax")
 11 in violation of the Telephone Consumer Protection Act ("TCPA"), 47 U.S.C. § 227. (ECF
 12 No. 1-1.)¹ True Health alleged that it received a single unsolicited fax advertisement on April 20,
 13 2010. (*Id.* ¶ 11.) Plaintiff filed a first amended complaint on June 20, 2013. (ECF No. 7.)

14 Plaintiff sought leave to file a second amended complaint on May 5, 2014 (ECF No. 69),
 15 and the Second Amended Complaint ("SAC") was filed on July 18, 2014. (ECF No. 90.) The
 16 SAC added McLaughlin Chiropractic Associates, Inc. ("McLaughlin") as a Plaintiff, and added
 17 McKesson Technologies, Inc. ("MTI") as a Defendant. McLaughlin alleged that it received three
 18 unsolicited fax advertisements, on February 3, 2010; February 22, 2010; and May 11,
 19 2010. (SAC ¶ 13.) Plaintiffs assert that none of the faxes contained an "opt-out notice"
 20 informing the recipient how to opt out of receiving future faxes. (*Id.* ¶ 19.) The SAC alleged the
 21 following class definition: "All persons who (1) on or after four years prior to the filing of this
 22 action, (2) were sent telephone facsimile messages of material advertising the commercial
 23

24 ¹ Plaintiffs attempt to direct attention away from the problems with their class motion by
 25 referencing a May 2008 letter regarding unrelated allegations. But this purported "citation" to
 26 "McKesson" has no bearing on the issues in this motion. This letter was not even sent to
 27 Defendant McKesson Corporation, Defendant MTI, or the business unit at issue, PPS. Plaintiffs'
 28 further attempt to distract the Court with irrelevant discovery disputes should also be rejected.
 (See Pls.' Mot. for Class Certification ("Mtn."), ECF No. 209 at 6-8.) Defendants have refuted
 Plaintiffs' baseless accusations in their Opposition to Plaintiffs' Second Motion for Sanctions
 (ECF No. 210) and their proposed Surreply (ECF No. 218-2).

availability of any property, goods, or services by or on behalf of Defendants, (3) from whom Defendants did not obtain prior express permission or invitation to send those faxes, and (4) did not display a proper opt-out notice.” (*Id.* ¶ 21.)

On July 16, 2015, Plaintiffs filed their motion for class certification, seeking to certify a *different* class than the one alleged in the SAC: “All persons or entities who received faxes from ‘McKesson’ from September 2, 2009, to May 11, 2010, offering ‘Medisoft,’ ‘Lytec,’ or ‘Revenue Management Advanced’ software or ‘BillFlash Patient Statement Service,’ where the faxes do not inform the recipient of the right to ‘opt out’ of future faxes.”² (ECF No. 209 at 1, 15.)

III. FACTUAL BACKGROUND

During 2009-2010, Physician Practice Solutions (“PPS”), a business unit of MTI, sold practice management and electronic health records software, including Medisoft and Lytec. PPS’s primary customer base was smaller physicians’ offices, and many of these small doctors’ offices still used fax machines as a primary way of communicating. (Declaration of Jeffrey Paul in Supp. of Defs.’ Opp. to Pls.’ Mot. for Class Cert. (“Paul Decl.”) ¶ 3; Declaration of Tiffany Cheung in Supp. of Defs.’ Opp. to Pls.’ Mot. for Class Cert. (“Cheung Decl.”) Ex. K (Holloway Dep.) at 89:10-15 (“Our existing customers oftentimes would request us to send faxes specifically . . . and we would comply and send them faxes quite frequently.”), *id.* at 23:21-24.)

A. Customers Invited Promotional Faxes in a Variety of Ways.

The faxes at issue were sent only to existing customers who had previously purchased software and all voluntarily provided their fax numbers to PPS. (Cheung Decl. Ex. K (Holloway Dep.) at 89:10-15.) The faxes at issue provided information on available upgrades to the software previously purchased by these doctors’ offices. (SAC, Exs. A-B-3.) In addition, all customers entered into End User License Agreements (“EULA”) expressly agreeing that their contact information may be used to offer them features and services. (Paul Decl. ¶ 7, Ex. A at RS-

² Plaintiffs’ motion references then-pending third-party subpoenas and argues that Plaintiffs “may seek to amend the class definition, or perhaps create subclasses, to include additional faxing activity.” (Mtn. at 8-9.) On July 29, 2015, however, the Court granted Defendants’ motion for protective order, holding that Plaintiffs’ subpoenas were “patently overbroad” and constituted “a classic fishing expedition.” (ECF No. 213 at 5.)

1 TRUEHEALTH 000442 (“This Usage Information . . . also assists McKesson in offering End
2 User other features and services.”).)

3 Many, if not all, customers also provided consent through direct conversations with their
4 sales representative. (Cheung Decl. Ex. M at 2-3, Ex. K (Holloway Dep.) at 23:21-24; 89:23-90:3
5 (“Again, generally, they would have communications with their sales representative” and “our
6 customers would request a lot of information via fax.”).) Each sales representative at PPS
7 developed a relationship with each of his or her assigned customers, and in the course of that
8 relationship, customers requested and invited fax promotions. (*Id.* Ex. M at 2-3, Ex. K (Holloway
9 Dep.) at 89:23-90:3 (“The sales representatives had a decent handle on who their customers were.
10 It wasn’t an enormous number so they knew the people and they knew the ways they would like
11 to be communicated with.”).)

12 Customers specifically asked sales representatives “to fax them information on discounts,
13 promotions, and/or upgrades when available, so they could purchase upgrades or other services
14 and take advantage of discounts or promotions.” (Paul Decl. ¶ 4.) Some customers informed
15 their sales representatives that they preferred to receive communications, including promotions,
16 exclusively by fax, instead of by alternative ways. (Cheung Decl. Ex. M at 2-3; Paul Decl. ¶ 4 (“I
17 was instructed by certain customers that they never or rarely checked their emails, and therefore, I
18 would need to always send them information exclusively by fax, including information on
19 promotions or upgrades offered by PPS.”).) “Many customers expressed their appreciation for
20 the information on promotions and upgrades sent by PPS.” (Paul Decl. ¶ 4.)

21 **B. No Records Identify the Recipients of Promotional Faxes.**

22 No records in this case identify the recipients of promotional materials faxed by PPS. To
23 attempt to ascertain the class, Plaintiffs rely on fax transmission logs and Defendants’
24 interrogatory responses referring to “recipients” of the faxes. (Mtn. at 11-12.) But the
25 transmission logs merely show the number that a fax was sent to on a particular day, and the
26 interrogatory responses list the individual or entity customer name associated with that number in
27 PPS’s *separate* customer databases. (Cheung Decl. ¶ 18.) Defendants’ interrogatory responses
28 were created for the purpose of complying with the Court’s Order directing Defendants to provide

interrogatory responses identifying entities that had consented to the faxes at issue (ECF No. 143 at 4). To prepare these responses, Defendants combined fax detail reports from third-party Slingshot Technologies (“Slingshot”) with customer contact information from PPS’s *separate* databases. The use of the term “recipient” in Defendants’ interrogatory responses simply mirrors the Order’s language. (ECF No. 209-1 (Hara Decl.) ¶ 5; ECF No. 178 at 12.) PPS’s database does not show who owned the fax machine, who subscribed to the fax number identified in the transmission log, or who picked up the fax. The database lists only the name that the person who registered the software decided to enter as a customer name.

Plaintiffs’ expert does not dispute that the logs do not identify this information. (*See* Cheung Decl. Ex. L (Biggerstaff Dep.) at 248:21-25, 249:1-2, 10-12 (conceding there is no “feasible way to determine which entity or person picked up a fax that was sent to any fax machine”), 249:10-12 (testifying that the customer name and address listed on the logs would be “the place to start” the ownership inquiry), 238:16-22 (testifying that he would first start with the names and addresses listed on the logs to begin identifying subscribers).)

C. Plaintiffs Cannot Identify a Feasible Way to Determine the Fax Recipients.

Plaintiffs’ expert, Robert Biggerstaff, did not propose any methodology in his first report for identifying class members. This failure is critical given the lack of an “available data source to identify the historical subscribers associated with facsimile numbers.” (*Id.* Ex. P (Sponsler Report) ¶ 9.) Mr. Biggerstaff’s second report proposes subpoenaing telecommunications carriers to obtain current subscriber data and asserts, without support, that carriers “have dedicated teams with automated systems that will produce the desired information automatically and efficiently.” (ECF No. 209-13 (Second Biggerstaff Report) ¶¶ 15-16.) The experience of Defendants’ expert, Mr. Sponsler, is to the contrary: “many carriers refuse to respond to these subpoenas without the consent of each of their customers and/or object to the subpoenas on the grounds that they violate various statutes and laws.” (Cheung Decl. Ex. P (Sponsler Report) ¶ 14.)

Mr. Biggerstaff claims that breaking down the identification of subscribers into “manageable pieces demonstrates the task is both quantitatively and qualitatively manageable,” but he never states how he would break down the identity of nearly 12,000 historical fax

1 subscribers and locate them today. (ECF No. 209-13 (Second Biggerstaff Report) ¶ 19.)

2 Mr. Biggerstaff does not address the practical challenges with identifying recipients of
3 faxes that are more than five years old. “Business telephone numbers are frequently disconnected
4 and reassigned as well, meaning that just because a particular carrier shows that a certain
5 telephone number is now assigned to it, that does not mean that said number has always been
6 assigned to that carrier.” (Cheung Decl. Ex. P (Sponsler Report) ¶ 18.) At his deposition,
7 Mr. Biggerstaff could not identify a single TCPA case where carriers were subpoenaed for six-
8 year-old historical subscriber data. (*Id.* Ex. L (Biggerstaff Dep.) at 134:9-12 (“Q. And do you
9 recall in any of the cases where subscriber information has been asked for going back to the last
10 six years? A. Not that I recall.”).) He could identify only one carrier that may provide subscriber
11 information older than five years (*id.* at 135:23-25; 136:1-5), and conceded that historical
12 subscriber data may not be available if it was “several years in the past and the data had rolled
13 off.” (*Id.* at 133:13-14.) Mr. Biggerstaff surmises it would take over 100 carrier subpoenas to
14 ascertain all of the subscribers in this case (*id.* Ex. L (Biggerstaff Dep.) at 247:13-16), but
15 Mr. Sponsler’s experience shows that because of the “volatility within the telecom industry, there
16 is no way to determine with certainty which or how many carriers would need to be subpoenaed
17 in order to determine the carriers” associated with each of the nearly 12,000 fax numbers at issue.
18 (*Id.* Ex. P (Sponsler Report) ¶ 13.) Further, Mr. Biggerstaff’s claim that three-fourths of the fax
19 “recipients” in this case can be easily identified from current subscriber data (ECF No. 209-13
20 (Second Biggerstaff Report) ¶¶ 12, 13, 20) improperly conflates the terms “recipient” and
21 “current subscriber” and is based on a mathematically unsound calculation. (Cheung Decl. Ex. Q
22 (Second Sponsler Report) ¶¶ 9, 12.)

23 **D. Both Named Plaintiffs Consented To Be Sent Faxes.**

24 Dr. Franya Peterson, a chiropractor working in McLaughlin’s office, was a Medisoft
25 customer. She was authorized to use McLaughlin’s fax machine, admitted that she voluntarily
26 provided McLaughlin’s fax number while registering Medisoft, and admitted that she expected to
27 receive faxes as a result. (Cheung Decl. Ex. G (Peterson Dep.) at 41:2-8; 51:22-52:4; 78:12-14,
28 17-19; 85:10-12; 108:14-16, 21-24; Ex. H.) On the software registration form, “MCLAUGHLIN

1 CHIROPRACTIC CENTER” was entered as the “Practice/Registration Name,” “Franya M.
 2 Peterson, D.C.” was entered as the “Physician/Contact Name,” and McLaughlin’s fax number
 3 was provided. (*Id.* Ex. H at Dep. Exs. 13, 16.) The same information was entered on a Technical
 4 Support Agreement. (*Id.* at Dep. Ex. 18.) Dr. Peterson admitted that she was not required to
 5 provide a fax number and that she voluntarily provided the number of the fax machine she was
 6 authorized to use. (*Id.* Ex. G (Peterson Dep.) at 51:22-25; 52:1-7; 108:14-16, 21-24.) Plaintiff
 7 McLaughlin likewise admits that Dr. Peterson has had authorization to use the McLaughlin fax
 8 number and to send and receive faxes at that fax number since at least 2007. (*Id.* Ex. J
 9 (McLaughlin Dep.) at 127:14-129:1.) Joanna Fry, the receptionist at McLaughlin; Dr. Peterson;
 10 Dr. McLaughlin; and two other doctors used the fax machine while they worked there (*id.* Ex. I
 11 (Fry Dep.) at 66:21-67:2), and anyone working there could pick up faxes received on the fax
 12 machine. (*Id.* Ex. G (Peterson Dep.) at 76:17-23.)

13 True Health admitted in responses to requests for admission that it provided its fax
 14 number when registering as a Medisoft customer. (*Id.* Ex. D at 1-2.) When registering Medisoft,
 15 “TRUE HEALTH CHIROPRACTIC” was entered as the “Registration Name,” “Jeffrey R.
 16 Shope, D.C.” was entered as the “Contact,” and True Health’s fax number was entered. (*Id.*
 17 Ex. B.)³ Numerous True Health employees were authorized to use its fax number and to receive
 18 faxes on True Health’s fax machine. (*Id.* Ex. O (Jordan Dep.) at 16:15-17:2, 36:1-18, 89:3-13,
 19 91:2-5, 94:23-95:14.) Dr. Jeffrey Shope, Sandra Jordan (Perry), Josh Riscavage, and potentially
 20 others had communications with the company selling Medisoft regarding True Health’s purchase
 21 or registration. (*Id.* at 60:21-24, 76:25-77:17; *id.* Ex. F (Shope Dep.) at 43:11-20.)

22 **E. The President of True Health Has Admitted to Fraud.**

23 Dr. Jeffrey Shope, the owner, proprietor, and President of True Health, admitted to fraud
 24 and a pattern of fraudulent conduct when he entered into a Consent Agreement with the Ohio
 25

26 ³ Plaintiffs have argued that the print-out version of this registration page produced by
 27 Defendants indicates that a “Do not Fax” box is checked. But this assertion mischaracterizes the
 28 evidence. The electronic version shows that the box is “all grayed out, meaning no option had
 been selected by the customer.” (*Id.* Ex. E (Taylor Dep.) at 80:5 – 81:1.)

Board of Chiropractic Examiners. *See In re Jeffrey Roman Shope, D.C., License No. 2333*, Case No. 97 OBCE 121 (June 30, 1998). His license was suspended for one year, he received at least five years of probation, and he was required to complete 48 hours of instruction in ethics, risk management, and billing. *Id.* In 2012, the FBI raided True Health’s office as part of a fraud investigation. (Cheung Decl. Ex. O (Jordan Dep.) at 52:2-10.) The FBI’s inquiry goes back 10 years, including the time period of the alleged conduct in this case. (*See id.* at 82:11-17; 71:14:18.) A criminal docket was opened on August 12, 2015, in the U.S. District Court for the Southern District of Ohio, titled *USA v. Shope*, Case No. 15-cr-00189-GLF, for an Information alleging “a scheme to defraud health care benefit programs.”

IV. LEGAL STANDARD

Class actions are an “exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only.” *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2550 (2011) (citation omitted). Plaintiffs seeking to maintain a class action must show that class treatment is appropriate — not by relying on the pleadings but through actual proof that each of the requirements of Rule 23 is met. *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1432 (2013); *Dukes*, 131 S. Ct. at 2551-52. Where, as here, plaintiffs seek certification under Rule 23(b)(3), any common questions must predominate over the individualized ones. *Id.*; *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 624 (1997). Plaintiffs cannot satisfy their burden with “promises,” *In re Graphics Processing Units Antitrust Litig.*, 253 F.R.D. 478, 506-07 (N.D. Cal. 2008), to “provide solutions” to prevent the “individual issues from splintering the action.” *In re Hotel Tel. Charges*, 500 F.2d 86, 90 (9th Cir. 1974).

V. ARGUMENT

A. Plaintiffs Cannot Demonstrate Predominance.

In *Comcast Corp.*, the Supreme Court reiterated that class certification requires “rigorous analysis” and held that Rule 23(b)(3)’s predominance analysis “is even more demanding” than Rule 23(a)’s analysis because Rule 23(b)(3) is an “adventuresome innovation.” 133 S. Ct. at 1432 (quotations and citation omitted). To certify a class under Rule 23(b)(3), a plaintiff bears the heavy burden of demonstrating through “evidentiary proof” that questions “common to class

members *predominate over* any questions affecting only individual members.” *Id.* (emphasis added); *see also Faulk v. Sears Roebuck & Co.*, No. 11-CV-02159 YGR, 2013 U.S. Dist. LEXIS 57430, at *23 (N.D. Cal. Apr. 19, 2013). Where the resolution of a case “require[s] the separate adjudication of each class member’s individual claim or defense,” class treatment is inappropriate. *Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1189 (9th Cir. 2001) (quotations and citation omitted). Plaintiffs cannot establish predominance here.

1. Plaintiffs Must Prove Lack of Consent in Their Affirmative Case and the FCC Could Not Vary That Requirement.

This Court has expressly held that a recipient’s lack of consent is a required element of the plaintiff’s affirmative case under the TCPA. *Fields v. Mobile Messengers Am., Inc.*, No. C 12-05160 WHA, 2013 WL 6073426, at *4 (N.D. Cal. Nov. 18, 2013). *Fields* based its conclusion on the Ninth Circuit’s holding in *Meyer v. Portfolio Recovery Assocs. LLC*, 707 F.3d 1036, 1043 (2012), that one of the three elements of a TCPA claim is that the communication was sent without the recipient’s prior consent. *Fields*, 2013 WL 6073426, at *3; *see also Smith v. Microsoft Corp.*, 297 F.R.D. 464, 471 (S.D. Cal. 2014) (concluding that “the absence of express prior consent, however, is one of the three elements of a TCPA claim, which Plaintiff bears the burden of satisfactorily establishing for the Court”).⁴

The relevant portions of the TCPA expressly state that proof of an “unsolicited” fax is a required element of a claim.⁵ The statute provides that it is unlawful for any person:

⁴ In opposition to Defendants’ motion to stay, Plaintiffs argued that it is Defendants’ burden to prove consent. (ECF No. 212 at 13.) But Plaintiffs cite only out-of-circuit district court cases for this position. This Court should follow controlling Ninth Circuit authority in *Meyer*, holding that one of the elements of a TCPA plaintiff’s case is to prove that the communication was sent “without the recipient’s prior express consent.” 707 F.3d at 1043. While a few courts have attempted to avoid this result, courts have consistently found that at class certification, the question of which party bears the consent burden does not matter because it is undisputed that *plaintiffs* bear the burden of proving that consent, or lack thereof, can be resolved through common evidence that applies to the entire class. *See, e.g., Kristensen v. Credit Payment Servs.*, 12 F. Supp. 3d 1292, 1307 (D. Nev. 2014).

⁵ Even Plaintiffs concede that determining whether PPS was a “sender” of any given fax transmission requires that it be a “person or entity on whose behalf a facsimile *unsolicited* advertisement is sent or whose goods or services are advertised or promoted in the *unsolicited* advertisement.” (Mtn. at 1 (quoting 47 C.F.R. § 64.1200(f)(10)) (emphasis added).)

(C) to use any telephone facsimile machine, computer or other device to send, to a telephone facsimile machine, an *unsolicited* advertisement, unless –

(i) the *unsolicited* advertisement is from a sender with an established business relationship with the recipient;

(ii) the sender obtained the number of the telephone facsimile machine through –

(I) the voluntary communication of such number, within the context of such established business relationship, from the recipient of the *unsolicited* advertisement, . . . and

(iii) the *unsolicited* advertisement contains a notice [the opt-out notice] meeting the requirements of paragraph (2)(D) [authorizing the FCC to promulgate regulations for opt-out notices on *unsolicited* advertisements].

47 U.S.C. § 227(b)(1)(C) (emphasis added).

The FCC had no power to ignore the express provisions of the statute or to extend a requirement to *solicited* faxes when the statute is specifically limited to *unsolicited* faxes. As established in *Chevron v. NRDC, Inc.*, 467 U.S. 837, 842-43 (1984): “If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.” Indeed, a “regulation may not serve to amend a statute, nor add to the statute ‘something which is not there.’” *Cal. Cosmetology Coalition v. Riley*, 110 F.3d 1454, 1460 (9th Cir. 1997) (citation omitted); *see Utility Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2445 (2014) (“An agency has no power to ‘tailor’ legislation to bureaucratic policy goals by rewriting unambiguous statutory terms.”). While the D.C. Circuit will be the first appellate court to review the FCC’s attempt to extend the opt-out notice requirement to consented-to faxes, other courts have already opined that the FCC exceeded its statutory authority in attempting to regulate solicited faxes.⁶

⁶ *See, e.g., Kaye v. Merck & Co., Inc.*, No. 10-cv-1546, 2014 WL 2002447, at *2 (D. Conn. May 15, 2014) (“I am inclined to agree with the defendants that the FCC lacks authority to regulate solicited faxes [pursuant to Section 227(b) of the TCPA].” (quoting *Physicians Healthsource, Inc. v. Purdue Pharma L.P.*, No. 12-CV-1208, 2014 WL 518992, at *3 (D. Conn. Feb. 3, 2014)); *Raitport v. Harbour Capital Corp.*, No. 09-cv-156-SM, 2013 WL 4883765, at *1 (D.N.H. Sept. 12, 2013) (“Congress surely intended to protect citizens from the impositions associated with unwanted, unwelcome, ‘unsolicited’ facsimile advertisements, but likely did not

(Footnote continues on next page.)

1 Plaintiffs effectively concede in their motion that if the opt-out notice does not apply to
 2 “solicited” faxes, individual issues pertaining to consent defeat predominance here. Given that
 3 the plain language of the TCPA applies to only *unsolicited* faxes, several parties have sought
 4 review of the FCC’s regulation purporting to extend the opt-out notice requirements to *solicited*
 5 faxes, and those consolidated appeals are pending. *See Bais Yaakov of Spring Valley v. FCC*, No.
 6 14-1234 (D.C. Cir.). The D.C. Circuit is expected to rule that solicited faxes do not require an
 7 opt-out notice. To exclude those with no claim because they received solicited faxes, numerous
 8 individualized inquiries would be required to determine whether each of the individual 70,000+
 9 faxes was solicited.⁷

10 Defendants also have petitioned the FCC for a waiver from the opt-out notice
 11 requirements to the extent they are applied to solicited faxes. (ECF No. 208-2.) Such a waiver
 12 would likewise require many individualized determinations to determine which of the 70,000+
 13 faxes were solicited and which may have been unsolicited. Plaintiffs argue that the waiver ruling
 14 would not apply here because the separation of powers doctrine would be violated. As more fully
 15 discussed in Defendants’ Motion to Stay briefing (ECF No. 208, No. 217), Plaintiffs are simply
 16 wrong. The doctrine is potentially implicated only where a legislative body impermissibly
 17 dictates findings in private litigation without changing underlying law. *Cook Inlet Treaty*
 18 *Tribes v. Shalala*, 166 F.3d 986, 990-91 (9th Cir. 1999) (citing *Gray v. First Winthrop Corp.*, 989
 19 F.2d 1564, 1568 (9th Cir. 1993)). But that is not what the FCC has done for similarly situated
 20 petitioners and would be doing if it grants Defendants’ waiver petition. Rather, recognizing the
 21 significant uncertainties created when it applied its opt-out notice rule to solicited faxes, the FCC
 22 has granted waivers to numerous parties subjected to that uncertainty. *In re Rules and*

23
 24 (Footnote continued from previous page.)

25 think it necessary to protect citizens from ‘solicited’ facsimile advertisements—ones they invited
 26 and affirmatively wished to receive.”).

27 ⁷ Plaintiffs rely on two cases, *IRA Holtzman C.P.A. & Assocs. Ltd. v. Turza*, 728 F.3d 682
 28 (7th Cir. 2013), and *Vandervort v. Balboa Capital Corp.*, 287 F.R.D. 554 (C.D. Cal. 2012), in
 arguing that consent is irrelevant if the faxes had no opt-out notice. (Mtn. at 9.) Neither court,
 however, discussed or even noted the inconsistency between the statute and the FCC’s rule.

1 *Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 29 FCC Rcd. 13998 (Oct. 30,
2 2014). The sole case to suggest that a separation of powers issue might arise found that the faxes
3 at issue in that case were *unsolicited*, and accordingly, the waiver could not apply to those faxes
4 in any event.⁸

5 **2. Individual Issues Regarding Consent Defeat Predominance.**

6 Courts routinely hold that in TCPA cases where there is evidence that customers have
7 consented to receive the communication, determining whether each class member has consented
8 creates individual issues that preclude predominance. Unless there is *no* evidence of consent, or
9 the defendant obtained consent using a single, uniform method that can be evaluated on a
10 class-wide basis, the issue of consent defeats predominance. The *Connelly* court summarized the
11 jurisprudence that has emerged on this issue: “Although TCPA cases are not ‘per se’ unsuitable
12 for class resolution, class certification is warranted only when the ‘unique facts’ of a particular
13 case indicate that individual adjudication of *the pivotal element of prior consent is unnecessary.*”
14 *Connelly v. Hilton Grand Vacations Co.*, 294 F.R.D. 574, 577 (S.D. Cal. 2013) (citing *Gene &*
15 *Gene LLC v. Biopay*, 541 F.3d 318, 326 (5th Cir. 2008)) (emphasis added). *Connelly* concluded
16 that classes had been certified only when defendants did not obtain consent at all, or did so under
17 uniform circumstances. *Id.* at 578 (Because the list of numbers called was not “a list of
18 homogeneously unconsenting recipients” and “express consent should be evaluated on an
19 individual basis,” common issues did not predominate.).⁹

20 Thus, the “rule that can be extracted from these [TCPA] cases is that issues of

21 ⁸ In *Physicians Healthsource, Inc. v. Stryker Sales Corp.*, 65 F. Supp. 3d 482 (W.D. Mich.
22 2014) (*Stryker II*), the court did not consider the pending challenge in the D.C. Circuit to the
23 FCC’s authority to promulgate the FCC rule regarding solicited faxes or the potential impact of
24 that appeal in a case involving solicited faxes, such as this one. Indeed, the *Stryker II* court
concluded that the TCPA does not apply to solicited faxes. *Id.* at 494 (“The second question for
this Court to consider is whether the fax was unsolicited, which is the only kind of fax expressly
regulated by the TCPA.”).

25 ⁹ Plaintiffs’ contention that TCPA fax cases are “routinely” certified or that certification of
26 TCPA fax classes is common relies on cases *where it is undisputed that the faxes were*
27 *unsolicited*. (Mtn. at 9-10 (*see, e.g., Physicians Healthsource, Inc. v. Doctor Diabetic Supply,*
28 *LLC*, No. 12-2230-CIV, 2014 WL 7366255, at *5 (S.D. Fla. Dec. 24, 2014) (defendant had “not
yet presented any evidence of express invitation or permission from any recipient”).) That is not
this case.

1 individualized consent predominate where a defendant sets forth specific evidence showing that a
2 significant percentage of the putative class consented” to receiving the communications.

3 *Jamison v. First Credit Servs., Inc.*, 290 F.R.D. 92, 106-07 (N.D. Ill. 2013) (denying class
4 certification); *Fields*, 2013 WL 6073426, at *4 (same). Moreover, as *Fields* held, even if the
5 issue of consent is an affirmative defense, “individualized inquiries regarding consent remain,”
6 and plaintiffs could not prove predominance. *Id.*; accord *Shamblin v. Obama for America*,
7 No. 13-cv-2428, 2015 U.S. Dist. LEXIS 54849, at *28-29 (M.D. Fla. April 27, 2015).

8 That case law demonstrates that certification is inappropriate here. Even in *Jamison*,
9 where there was evidence that some numbers had been “skip-traced” such that those call
10 recipients likely did not consent, the court still denied class certification based on the evidence
11 that some percentage of the class had consented. 290 F.R.D. at 96, 110. The evidence of consent
12 is even stronger here. The voluntary provision of a fax number constitutes prior express consent
13 to receive faxes at that number for purposes of the TCPA. *See, e.g., Baird v. Sabre Inc.*, 995 F.
14 Supp. 2d 1100, 1106-07 (C.D. Cal. 2014) (concluding plaintiff’s provision of her phone number
15 to airline constituted consent to receive texts); *Emanuel v. Los Angeles Lakers, Inc.*, No. CV-12-
16 9936-GW (SHx), 2013 WL 1719035, at *3-4 (C.D. Cal. Apr. 18, 2013) (same).

17 Defendants sent the faxes at issue *only* to existing customers who consented to receive
18 them. Defendants obtained consent in a variety of ways, including when customers registered
19 their software products, when they entered into EULAs for the products, and in daily interactions
20 with PPS’s employees. *See supra* section III-A. Defendants’ evidence establishes that many, if
21 not all, customers consented to receive marketing faxes through direct conversations with their
22 sales representatives. (*Id.*) Indeed, customers expressly requested that information, including
23 about upgrades and promotions, be provided by fax rather than other means. (*Id.*) Here, then, it
24 is clear that Defendants have come forward with evidence of consent, and that Defendants
25 obtained consent by a variety of methods, including oral communications. To the extent that the
26 named Plaintiffs or any purported class member disputes this evidence, individualized inquiries
27 will be required to resolve such disputes.

28 In *Jamison*, the court denied class certification because it would have been required to

1 conduct a series of mini-trials to determine liability, including scouring defendants' records to
 2 determine if a particular class member's cell phone number appeared in the cell phone field, the
 3 notes field, or the audit log. 290 F.R.D. at 107. Here, the individualized investigation would
 4 require even more effort — not only would the finder of fact be required to scour Defendants'
 5 registration records, sales database, and any notes kept by inside sales representatives, but also
 6 inquire about the recollections of numerous inside sales representatives and thousands of
 7 customers regarding conversations that occurred over five years ago about fax promotions.

8 Plaintiffs' only response is to suggest that "Defendants admit that they have no evidence
 9 of permission with respect to 1,829 fax numbers that received a confirmed 9,313 total
 10 transmissions." (Mtn. at 18.) But that is a misrepresentation: it simply ignores Defendants'
 11 supplemental interrogatory responses, which provided evidence of consent for each of these fax
 12 numbers. (ECF No. 208-10.) It also ignores Defendants' extensive evidence that consent was
 13 frequently obtained during routine, oral interactions between Defendants' sales force and their
 14 customers, and thus would not necessarily be reflected in written agreements or databases.

15 **3. Individual Issues Regarding Class Membership Also Defeat** 16 **Predominance.**

17 The basic question of membership in the class also presents numerous individual issues.
 18 Defendants' records do not identify the individuals who received the faxes at issue. They do not
 19 show who owned the fax machines, who the subscribers were, or who actually received the faxes
 20 at issue. Because the purported class members are businesses, multiple individuals had access to
 21 the fax machines; this was true, for example, in the case of both named Plaintiffs. *See supra*
 22 section III-D. Thus, the identity of the purported class members — the "recipients" of the faxes
 23 — could only be determined with extensive individual inquiries as to the details and
 24 circumstances of each of the approximately 70,000 transmissions and 44 exemplar faxes at
 25 issue.¹⁰ For this reason as well, common issues do not predominate. *See Gannon v. Network Tel.*

26 ¹⁰ Plaintiffs overstate the number of transmissions, as at least one fax (ECF No. 209-2
 27 at 4) is not covered by their new class definition. Moreover, in the third-party transmission logs
 28 relied upon by Plaintiffs, there are 4,262 entries with no indication in the logs that the faxes were
 successfully transmitted. (Cheung Decl. Ex. Q (Second Sponsler Report) ¶ 10.)

1 *Servs., Inc.*, No. CV 12-9777-RGK (PJWx), 2013 WL 2450199, at *2-3 (C.D. Cal. June 5, 2013).

2 **B. Plaintiffs Cannot Demonstrate an Identifiable and Ascertainable Class.**

3 As courts within this Circuit have uniformly held, “the party seeking certification must
4 demonstrate that an identifiable and ascertainable class exists.” *See, e.g., Xavier v. Philip Morris*
5 *USA, Inc.*, 787 F. Supp. 2d 1075, 1089 (N.D. Cal. 2011).¹¹ A class cannot be certified unless
6 plaintiffs can establish “an objective way to determine” who is a class member. *See Williams v.*
7 *Oberon Media, Inc.*, 468 F. App’x 768, 770 (9th Cir. 2012). Plaintiffs’ class definition must be
8 “precise, objective, and presently ascertainable.” *O’Connor v. Boeing N. Am., Inc.*, 184 F.R.D.
9 311, 319 (C.D. Cal. 1998) (citation omitted). The “class definition must be sufficiently definite
10 so that it is administratively feasible to determine whether a particular person is a class member.”
11 *Wolph v. Acer Am. Corp.*, 272 F.R.D. 477, 482 (N.D. Cal. 2011).

12 Plaintiffs cannot meet these requirements or demonstrate the existence of an ascertainable
13 class. The operative complaint defines the purported class as persons who were sent *unsolicited*
14 faxes, that is, persons from whom Defendants allegedly did not obtain consent. (SAC ¶ 21.)
15 Plaintiffs now reverse course and seek to certify a different and far broader class of all fax
16 recipients, whether or not they consented to receive the faxes. Plaintiffs’ reasons for doing so are
17 apparent: the class alleged in the SAC was an improper “failsafe” class and posed the
18 insurmountable obstacle that Plaintiffs must identify, without individual proof, those potential
19 class members who had **not** consented to receive Defendants’ faxes. As Plaintiffs clearly
20 recognized, such a class is not ascertainable.¹²

21 ¹¹ Plaintiffs’ suggestion that the Ninth Circuit will decide in *Jones v. ConAgra*, No. 14-
22 16327 (9th Cir. 2014), “whether” there is an ascertainability requirement (Mtn. at 10 & n.2), as
23 opposed to the precise contours of that requirement, is nonsense. As this Court has recently
24 reiterated, “while not enumerated in Rule 23, in order to maintain a class action, the class sought
25 to be represented must be adequately defined and clearly ascertainable.” *Hendricks v. Starkist*
Co., No. 13-cv-00729-HSG, 2015 U.S. Dist. LEXIS 96390, at *11 (N.D. Cal. July 23, 2015)
(internal quotations omitted, citing *Berger v. Home Depot USA, Inc.*, 741 F.3d 1061, 1071 n.3
(9th Cir. 2014) (referring in dicta to “threshold ascertainability test”)).

26 ¹² Because Plaintiffs should not be permitted to seek certification of a class different from
27 the one alleged in the SAC, Plaintiffs’ putative class cannot be certified on this ground as well.
28 *See, e.g., Costello v. Chertoff*, 258 F.R.D. 600, 604-05 (C.D. Cal. 2009) (court is bound to class
definitions provided in the complaint and, absent an amended complaint, will not consider
certification beyond it). This is especially true where the new class definition is broader than that

(Footnote continues on next page.)

1 Plaintiffs' attempt to remedy the ascertainability problems with a new class definition also
 2 fails. Plaintiffs now seek to certify a class of *all* "recipients" of a fax offering Medisoft or Lytec
 3 software, whether solicited or unsolicited, which did not contain an opt-out notice. But there is
 4 no possible way to identify such "recipients" without extensive individual inquiry regarding each
 5 separate fax transmission.

6 **1. Plaintiffs' New Class Is Fatally Overbroad Because It Includes**
 7 **Purported Class Members Who Cannot Recover.**

8 As discussed in section V-A-1 above with respect to the issue of predominance, persons or
 9 entities that consented to receive the faxes at issue do not have a claim under the TCPA.
 10 Accordingly, the proposed class definition is fatally overbroad.

11 Courts have repeatedly recognized that where there is evidence that at least some
 12 purported class members consented to receive the communications at issue, the class is overbroad
 13 and unascertainable. For example, in *Vigus v. Southern Illinois Riverboat/Casino Cruises, Inc.*,
 14 274 F.R.D. 229, 235 (S.D. Ill. 2011), the proposed class included a substantial number of people
 15 who voluntarily provided their numbers; as a result, "the proposed class definition render[ed the
 16 class] overbroad and . . . unfit for certification." Further, the court held that if the class were
 17 modified to exclude those who had consented, that class could not be determined by "objective
 18 criteria applicable to the class as a whole" but would require specific, individual inquiries that
 19 would preclude certification. *Id.* Similarly, in *Cottle-Banks v. Cox Commc'ns, Inc.*, No. 10-CV-
 20 2133-GPC (WVG), 2013 WL 2244333, at *9-10 (S.D. Cal. May 21, 2013), the court held that the
 21 class was unascertainable because it included individuals who affirmatively accepted the
 22 challenged provisions as part of the enrollment process. *See also Gannon*, 2013 WL 2450199, at
 23 *2-3 (finding class unascertainable where members had multiple consent and disclosure
 24 interactions with defendant and thus individualized inquiries into consent were required).

25 Defendants here have presented evidence that all fax recipients had a pre-existing

26 (Footnote continued from previous page.)

27 alleged in the complaint. *See Berlowitz v. Nob Hill Masonic Mgmt., Inc.*, No. C-96-01241 MHP,
 28 1996 WL 724776, at *2 (N.D. Cal. Dec. 6, 1996).

relationship with PPS and consented in various ways to receive the faxes. To the extent that any individual class members dispute the consent evidence, litigating such disputes will require numerous individualized inquiries, including who had authority to use the business's fax machine and whether any of those individuals invited or permitted the faxes at issue.

2. The New Purported Class of All Fax "Recipients" Is Unidentifiable.

Even taking the class definition at face value, Plaintiffs cannot ascertain the class. Plaintiffs have the burden of proving that the proposed class is readily identifiable through objective criteria. *Rader v. Teva Parenteral Meds., Inc.*, 276 F.R.D. 524, 529 (D. Nev. 2011). This requirement permits the court to determine who is bound by the judgment and protects the due process rights of absent class members by ensuring they receive notice and the opportunity to opt out. Fed. R. Civ. P. 23(b)(3)(c). Similarly, the class definition must be sufficiently objective and precise that notice is *meaningful* and absent class members can determine whether they are in the proposed class. *O'Connor v. Boeing N. Am., Inc.*, 180 F.R.D. 359, 367 (C.D. Cal. 1997) (ascertainability requires an administratively feasible method for determining class members).

a. Plaintiffs' Purported "Recipient" Class Is Not Ascertainable.

Plaintiffs' purported class of all fax "recipients" fails to meet the requirements for ascertainability for multiple reasons. First, it does not even attempt to define who the class members are, objectively or otherwise. The court in *Sandusky Wellness Center LLC v. Medtox Scientific, Inc.*, No. 12-2066, 2014 WL 3846037, at *3 (D. Minn. Aug. 5, 2014), found a virtually identical alleged class of persons who were "sent" faxes to be unascertainable. Purporting to define a class of "recipients" or those who "received" faxes begs the question of who the class member is. Is it the person who received the fax, the business or individual who owns the fax machine, or the subscriber for the fax number? As *Sandusky* explains:

In order to determine to whom each fax was sent—and thus, who was injured—the parties and the court *would need to delve into the unique circumstances of each fax transmission*. The answer may come more easily in some instances—for example if the person to whom the fax is sent is the sole owner and user of the fax machine—but *that information is not ascertainable absent an individualized inquiry*.

2014 WL 3846037, at *4 (emphasis added). This problem is particularly acute where, as here, the

1 faxes were sent to businesses, not individuals, resulting in a high likelihood of multiple potential
 2 claimants for a single fax. *See Compressor Eng'g Corp. v. Mfrs. Fin. Corp.*, 292 F.R.D. 433,
 3 449-50 (E.D. Mich. 2013) (criticizing *Turza*, 2009 WL 3334909; “such a ruling accomplishes
 4 nothing in terms of preventing multiple claims stemming from a single fax because it leaves it
 5 unclear as to what is meant by a person who ‘was sent’ a fax advertisement”). Thus, a proposed
 6 class of fax “recipients” is imprecise, amorphous, and not ascertainable.

7 Plaintiffs do not seriously suggest otherwise. Instead, they purport to rely on cases from
 8 the Sixth Circuit which hold that standing is not restricted to fax “owner[s].” (Mtn. at 11 (citing
 9 *Imhoff Inv., LLC v. Alfoccino, Inc.*, No. 14-1704, 2015 WL 4079438 (6th Cir. July 7, 2015); *Am.*
 10 *Copper & Brass, Inc. v. Lake City Indus. Prods.*, 757 F.3d 540 (6th Cir. 2014)).) But neither of
 11 those cases even addresses, let alone seeks to resolve, the issue of how the actual class members
 12 will be identified. *Imhoff* merely addressed the issue of standing, not class certification.
 13 *American Copper* relied on the fact that the defendant had waived the ascertainability issue and
 14 assumed without discussion or consideration that fax numbers could be tied to the actual
 15 claimants. As *Sandusky* holds, and as demonstrated below, that is not the case.

16 Plaintiffs argue that they can ascertain the identity of individual class members because
 17 they have the “target fax numbers” and transmission logs showing the date and time of each
 18 transmission. (Mtn at 11.) But that was equally true in *Sandusky*. As in *Sandusky*, Plaintiffs do
 19 *not* have what is necessary for an ascertainable class — the ability to identify the actual class
 20 members without individual inquiries regarding who received each fax.

21 Plaintiffs claim the fax transmission logs identify the fax recipients. (*Id.*) They do not.
 22 At best, the documents merely show the numbers to which faxes were sent on a particular day,
 23 and the individual or entity *separately* associated with that number in PPS’s customer database.
 24 The logs do *not* show who subscribed to that number at the time the fax was sent, who owned the
 25 fax machine connected to that number, or who picked up the fax from the machine. Plaintiffs do
 26 not provide an “objective” means to identify class members or give them notice without an
 27 individual inquiry into the circumstances surrounding each one of the approximately 70,000
 28 separate fax transmissions at issue.

1 In determining whether plaintiffs have demonstrated the existence of an ascertainable
 2 class, the court is “concerned about identifying and providing notice to the class members as
 3 individuals, not merely numbers on a list.” *Smith*, 297 F.R.D. at 472-73 (Knowing which
 4 numbers were sent texts “is far different from knowing which of those numbers *received*” the
 5 texts.). A list of fax numbers does not suffice to identify class members because the “fax number
 6 is just the starting point of the analysis” and the court would be required “to delve into the unique
 7 circumstances of each fax transmission” to identify the recipients. *Sandusky*, 2014 WL 3846037,
 8 at *4. Accordingly, as in this case, the identity of class members to whom notice would be sent is
 9 “not ascertainable absent an individualized inquiry.” *Id.* Nor does Plaintiffs’ purported class
 10 definition of “recipients” provide objective criteria for class members to self-identify. How are
 11 class members to know whether the “recipient” of a particular fax under the class definition here
 12 is the fax machine owner, the subscriber, or the individual (if any) who picked up the fax?
 13 Plaintiffs have failed to demonstrate the existence of an ascertainable class.¹³

14 **b. Plaintiffs’ “Best Practical Notice” Argument Does Not Satisfy**
 15 **the Requirement of an Ascertainable Class.**

16 Plaintiffs argue that the Court should permit them to ignore their burden to define an
 17 objectively ascertainable class and instead merely give the “best notice practicable.” (Mtn. at 12.)
 18 Plaintiffs fail to say what that notice would be, but given the data available, it presumably means
 19 they would merely send faxed notice to the numbers to which the original fax transmissions were
 20 sent. Plaintiffs would then require the unidentified “class members” to “identify *themselves* by
 21 _____

22 ¹³ The other cases Plaintiffs rely on to argue that it suffices to define an unidentifiable
 23 class of fax “recipients” are inapplicable and unpersuasive. In *Kavu, Inc. v. Omnipak Corp.*, 246
 24 F.R.D. 642, 651-52 (W.D. Wash. 2007), the court did not address ascertainability at all in
 25 granting the motion for class certification; defendants’ ascertainability arguments in the motion
 26 for reconsideration did not address the issue of how individual class members could be identified.
 27 In *Vandervort*, the court relied on the fact that there was a database that contained “the entire
 28 universe of persons to whom a fax could have been sent.” 287 F.R.D. at 557-58. That is
 emphatically not the case here: PPS’s database simply contains a list of the customers associated
 with the fax number in question. It may or may not identify the owner of the fax machine, the
 subscriber, or the multiple employees who were authorized to, or did, actually receive the faxes.

1 filing claims.” (*Id.*) Plaintiffs do not cite a shred of authority that would permit such an end-run
 2 around the ascertainability requirement. Nor do Plaintiffs even attempt to address the practical
 3 and due process problems with their proposal.

4 Plaintiffs ignore numerous practical difficulties with identifying and providing notice to
 5 potential class members simply by sending faxed notice to the list of fax numbers in the record.
 6 Even the list of fax numbers Plaintiffs rely upon is more than five years old. In the interim, the
 7 businesses may have dissolved; the employees who requested or picked up the fax may have left;
 8 and fax numbers may have been disconnected or changed. (*See* Cheung Decl. Ex. P (Sponsler
 9 Report) ¶¶ 17-25, 29-30 (opining that fax numbers are frequently disconnected and reissued));
 10 *Smith*, 297 F.R.D. at 473 (noting the likely turnover in class members’ numbers and that persons
 11 who should be in the class no longer owned the number that received the text); *Compressor*
 12 *Eng’g Corp.*, 292 F.R.D. at 451 (A six-year-old list was insufficient for notice “because the
 13 information is likely outdated and there would be no easy way of determining the current contact
 14 information for many of those entities connected to those phone numbers years ago, and many of
 15 the corporate entities may no longer exist.”). Any faxed notices sent to a five-year-old list of
 16 numbers will miss the class members whose fax numbers from 2009-2010 have been
 17 disconnected or changed or who have had high employee turnover.

18 Even if some potential class members were actually to receive this faxed notice, it is
 19 highly unlikely that the person picking up the fax would circulate it to other employees and
 20 discover someone who recalls the receipt of an unremarkable fax sent over five years ago. Courts
 21 have found classes unascertainable and denied certification in precisely these circumstances
 22 because class members cannot be ascertained through unreliable self-identification. *See Brey*
 23 *Corp. v. LQ Mgmt. LLC*, No. JFM-11-718, 2014 WL 943445, at *1 (D. Md. Jan. 30, 2014)
 24 (denying class certification where class was not objectively defined and affidavits would require
 25 class members to recall receiving faxes six or seven years ago, noting that “the recollection of a
 26 putative class member that he, she, or it had received a particular unsolicited fax would be
 27 somewhat suspect”); *Smith*, 297 F.R.D. at 473 (asking plaintiffs to opt in if they remembered
 28 particular texts was “likely to be ineffective, because it is highly unlikely that, more than five

years out, an individual would remember receiving that single unsolicited text message”).

Plaintiffs fail to meet their burden to demonstrate there is an ascertainable class.

c. Plaintiffs’ Purported “Expert” Evidence Does Not Overcome Their Ascertainability Problem.

Ultimately acknowledging that they cannot define an ascertainable class based on Defendants’ records, Plaintiffs turn to their expert in an effort to salvage their class. But that effort is unavailing. As an initial matter, Mr. Biggerstaff’s second expert report, filed with Plaintiffs’ class motion two weeks after expert discovery closed on July 2, 2015 (ECF No. 190; No. 209-13 (Second Biggerstaff Report) ¶ 20), should be stricken as untimely.¹⁴

Even if the report is considered, however, it concedes that the purported class members cannot be identified from Defendants’ records and offers no credible methodology for identifying the class members or providing them notice. Mr. Biggerstaff instead suggests that some unidentified party could undertake the laborious and uncertain task of attempting to match the fax numbers and names in Defendants’ records with multiple other, unspecified databases. (ECF No. 209-13 ¶¶ 19-20.) Mr. Biggerstaff criticizes Defendants’ expert, Mr. Sponsler, for attempting to “match” data to the 411 database, but does not indicate what other databases he would use or how the process would work.¹⁵ (*Id.* ¶ 17.)

Mr. Biggerstaff claims that “in [his] experience” the carriers respond to subpoenas by “produc[ing] the desired information automatically and efficiently” (*id.*; Mtn. at 12), but he never says what that “experience” was or that he is aware of any specific instance where this actually happened. To the contrary, carriers have resisted production of this information sought through

¹⁴ See *Allen v. Similasan Corp.*, 306 F.R.D. 635, 640-41 (S.D. Cal. 2015) (granting motion to strike plaintiffs’ supplemental expert report filed with their class certification motion 11 days after class discovery closed, as plaintiffs did not offer substantial justification for not including the information in the original report); *Werdebaugh v. Blue Diamond Growers*, No. 12-CV-02724-LHK, 2014 WL 7148923, at *6-8 (N.D. Cal. Dec. 15, 2014) (excluding from consideration plaintiffs’ second supplemental expert report, filed with plaintiffs’ opposition to defendant’s motion to decertify a month after expert discovery closed).

¹⁵ Although Mr. Biggerstaff proposes serving subpoenas on the top 7 carriers, McLaughlin’s carriers (Knology and later, WOW) do not appear on that list, and thus Mr. Biggerstaff’s proposal would result in a class list that does not include a named Plaintiff. (*Id.* ¶ 15.)

subpoenas. (*See* Cheung Decl. Ex. N (Sponsler Dep.) at 30:16-24; *id.* Ex. P (Sponsler Report) ¶¶ 12-14 (opining that carrier subpoenas are not an administratively feasible method of identifying historical fax subscribers)); *see also* *Ades v. Omni Hotels Mgmt.*, No. 2:13-cv-02468-CAS(MANx), 2015 U.S. Dist. LEXIS 65493, at *3 (C.D. Cal. May 18, 2015) (court required carrier to obtain customer consent before it could release individual subscribers' information); *Aranda, et al. v. Caribbean Cruise Line, Inc., et al.*, 1:12-cv-04069, Order, ECF No. 317 (N.D. Ill. July 17, 2015) (same).¹⁶ Moreover, unlike in *Ades* and *Aranda*, Plaintiffs here have made no effort to subpoena the carriers; they merely note this as a theoretical possibility.

Even if historical subscriber data existed and the carriers produced it, there must be individualized inquiries into whether the historical data matched the individuals and corporate entities listed in records in this case. For example, McLaughlin's phone bills identify "McLaughlin Chiropractic Clinic" as the subscriber; "McLaughlin Chiropractic Associates, Inc." owns the fax machine; Dr. Wesley McLaughlin allegedly picked up at least two of the faxes; and "McLaughlin Chiropractic Center" registered and consented to the faxes. (Cheung Decl. Ex. C; Ex. J (McLaughlin Dep.) at 125:3-25; 126:1-25; 127:1-18.) Based on Plaintiffs' own allegations, the subscriber (McLaughlin Chiropractic Center), the owner (McLaughlin Chiropractic Associates, Inc.), and the person who picked up the fax (Dr. Wesley McLaughlin) are all different. (*Id.* at 125:3-25; 126:1-25; 127:1-18; 164:6-7; 180:4-10; 182:7-9; 184:11-13.) It is unclear which one of them would be the putative class member.

C. Both Named Plaintiffs Are Inadequate and Atypical of the Purported Class.

Dr. Jeffrey Shope, the owner, proprietor, and President of True Health, admitted to fraud and a pattern of fraudulent conduct as part of a Consent Agreement he entered into with the Ohio Board of Chiropractic Examiners. *See supra* section III-E. Moreover, the FBI raided True

¹⁶ Indeed, carriers resist such subpoenas per state laws that require each individual subscriber's consent before such information can be produced. *See, e.g.*, Cal. Civ. Proc. Code § 1985.3(f) ("A subpoena duces tecum for personal records maintained by a telephone corporation . . . shall not be valid or effective unless it includes a consent to release, signed by the consumer whose records are requested . . ."); Cal. Pub. Util. Code § 2891 ("(a) No telephone or telegraph corporation shall make available to any other person or corporation, without first obtaining the residential subscriber's consent, in writing . . .").

1 Health's office in 2012 in connection with an ongoing fraud investigation, which covers activities
 2 dating back at least ten years. *Id.* These facts make True Health patently *inadequate*.

3 Fraud-related offenses render a proposed class representative inadequate because they
 4 detract from the claims of the class and raise doubts about the named plaintiff's credibility and
 5 integrity. *See, e.g., In re Proxima Corp. Sec. Litig.*, No. 93-1139, 1994 WL 374306, at *17-18
 6 (S.D. Cal. May 3, 1994) (class representative inadequate where he had admitted to allegations of
 7 fraud as part of a judgment in another lawsuit); *Jamison v. First Credit Servs., Inc.*, No. 12-C-
 8 4415, 2013 WL 3872171, at *2 (N.D. Ill. July 29, 2013) (TCPA plaintiff convicted of fraud was
 9 inadequate because the conviction would be offered to impeach his credibility with the jury, and
 10 would detract from the claims of the class). Indeed, courts have denied class certification on this
 11 basis.¹⁷ Dr. Shope's admissions of fraudulent conduct, compounded by the FBI's fraud
 12 investigation, make True Health both inadequate and atypical as a class representative.

13 Both named Plaintiffs also fail to satisfy the requirements of adequacy and typicality
 14 because the evidence demonstrates that they consented to receive the faxes at issue. Dr. Peterson,
 15 a chiropractor working in McLaughlin's office, admitted that she provided McLaughlin's fax
 16 number when registering for Medisoft and expected to receive faxes when providing that fax
 17 number. *See supra* section III-D. She executed two separate agreements with PPS in which she
 18 provided McLaughlin's fax number and identified "McLaughlin Chiropractic Center" as the
 19 business entering into the agreement. *Id.* Similarly, True Health admits that it provided its fax
 20 number when registering as a Medisoft customer. *Id.* For the reasons discussed in section V-A-1,
 21 *supra*, a recipient that consented to receive the faxes at issue has no claim in this case because the
 22 fax was solicited.¹⁸ Accordingly, neither named Plaintiff can represent a purported class of

23 ¹⁷ *See Schleicher v. Wendt*, No. 02-CV-1332, 2009 WL 761157, at *3 (S.D. Ind. Mar. 20,
 24 2009) ("This court is not willing to appoint as a class representative a person with a criminal
 25 conviction for fraud. . . . Smith is not an adequate class representative."), *aff'd*, 618 F.3d 679 (7th
 26 Cir. 2010); *accord Dunford v. Am. DataBank, LLC*, 64 F. Supp. 3d 1378, 1396-97 (N.D. Cal.
 2014) ("Ms. Dunford cannot fairly and adequately protect the interest of the proposed class.").
 The *Proxima* court reiterated that it "is proper for this Court to consider [a plaintiff's] integrity in
 assessing his adequacy as a class representative." *Proxima*, 1994 WL 374306, at *17.

27 ¹⁸ Dr. Wesley McLaughlin's contention that he was the subscriber and did not consent is
 28 irrelevant in light of the multiple expressions of consent by an apparent agent and the absence of
 (Footnote continues on next page.)

recipients of unsolicited faxes, nor is either Plaintiff typical of such a class.

D. The Proposed Class Is Neither Manageable nor Superior.

Because the class is not ascertainable and because individual, not common, questions predominate as to both ascertainability and consent, the purported class is neither manageable nor a superior vehicle for addressing Plaintiffs' claims. *Vigus*'s holding applies here:

Certifying this case as a class action would not achieve economies of time, effort or expense because of the numerous individual questions that would need to be answered to reach a fair and just result on the issue of liability. On the contrary, it would burden the Court and the litigants with the arduous task of sifting through each putative class member's claim to determine its merits on a case-by-case basis. This is unacceptable, particularly where putative class members who were actually aggrieved by the [defendant's] acts have a quick, adequate and superior remedy in other more speedy venues, such as, for example, a state small claims court.

274 F.R.D. at 238; *accord Smith*, 297 F.R.D. at 473 (where TCPA class was not ascertainable, court had "overwhelming concerns" about procuring necessary evidence and manageability; accordingly, plaintiff failed to demonstrate superiority); *Gannon*, 2013 WL 2450199, at *3 (where common issues did not predominate, class vehicle was not superior).

E. Plaintiffs' Rule 23(b)(2) Class Is Barred Because the TCPA Authorizes the Individual Recovery of Monetary Damages.

In an effort to overcome the many barriers to their (b)(3) class, Plaintiffs resort to seeking to certify a (b)(2) injunction-only class. (Mtn. at 16-17.) But that tactic has been doomed since the Supreme Court's decision in *Dukes*. 131 S. Ct. at 2557. In *Dukes*, the Court held that to certify a class under Rule 23(b)(2), plaintiffs must prove that monetary relief is merely "incidental to the[ir] injunctive or declaratory relief" claim. *Id.* Rule 23(b)(2) "does not authorize class certification when each class member would be entitled to an individualized award of monetary damages." *Id.*; *accord Wang v. Chinese Daily News, Inc.*, 737 F.3d 538, 544 (9th Cir. 2013)

(Footnote continued from previous page.)

anything in the records to suggest otherwise. Indeed, this internal dispute highlights McLaughlin's atypicality and further demonstrates the individualized inquiries necessary to identify the "subscriber" to each fax line and whether any authorized user of the fax machine (like Dr. Peterson) consented to receive the faxes at issue.

1 (“individualized monetary claims belong in Rule 23(b)(3)” rather than Rule 23(b)(2)) (quoting
2 *Dukes*, 131 S. Ct. at 2558).¹⁹

3 The TCPA authorizes statutory damages of \$500 per violation of the statute. 47 U.S.C.
4 § 227(b)(3). Plaintiffs have vigorously pursued monetary damages in this case, specifically
5 requesting in their motion that the Court determine on a class-wide basis whether the purported
6 class members are entitled to \$1500 for willful violation of the TCPA. (Mtn. at 1.)

7 Courts have repeatedly denied certification of (b)(2) classes in TCPA cases after *Dukes*
8 due to the statute’s provision for individual monetary damages. *See Connelly*, 294 F.R.D. at 579
9 (relying on *Dukes* and holding plaintiffs’ TCPA claims ineligible for 23(b)(2) certification
10 because each plaintiff was entitled to statutory damages); *Balschmiter v. TD Auto Fin. LLC*, 303
11 F.R.D. 508, 516 (E.D. Wis. 2014) (relying on *Dukes* and denying certification of 23(b)(2) class
12 because the TCPA authorizes statutory damages and certifying such a class “would impermissibly
13 allow the monetary tail to wag the injunction dog”) (quotations and citation omitted).

14 Notably, Plaintiffs ignore *Dukes* concerning this issue. They instead purport to rely on
15 *Kavu*, 246 F.R.D. at 649, and *Meyer v. Portfolio Recovery Assocs., LLC*, No. 11CV1008 AJB
16 (RBB), 2011 WL 11712610, at *5 (S.D. Cal. Sept. 14, 2011). (Mtn. at 16.) But *Kavu* predates
17 *Dukes*, and *Meyer* neither cites nor discusses *Dukes*. No (b)(2) class can be certified here.

18 **VI. CONCLUSION**

19 For the above reasons, Plaintiffs’ motion for class certification should be denied.

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25 ¹⁹ *See McKinnon v. Dollar Thrifty Auto. Grp., Inc.*, No. CV 12-cv-04457-SC, 2015 WL
26 4537957, at *12 (N.D. Cal. July 27, 2015) (concluding that certification under Rule 23(b)(2) was
27 inappropriate because plaintiffs primarily sought individualized monetary damages, including
28 “actual, compensatory, statutory, and/or exemplary damages”); *Brazil v. Dell Inc.*, No. C-07-
01700-RMW, 2010 WL 8816312, at *4 (N.D. Cal. Mar. 29, 2010) (monetary damages claim was
not secondary to injunctive relief claim).

1 Dated: August 13, 2015

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